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Reply to Mineola Office

August 8, 2012

Honorable James Orenstein
U.S. Magistrate Judge
U.S. District Court Eastern District of New York
U.S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Everest Reinsurance Co. a/s/o Fritz Hokel and Sym Realty v.
Cova Concrete Corp et al.*
Docket No.: CV 11 3427
HRRV File No.: 10310-000126

Dear Magistrate Orenstein:

We represent the interests of HSD Development, The Gold Development Group and Simon Dishinsky in the above-referenced matter. As you honor is aware, Everest Ins Co. has commenced this subrogation action to recover the monies it paid to its insured when the insured's building was damage as the result of construction work ongoing on the adjacent property. At the time of the incident, Orange County Concrete was pouring concrete on the third floor of the adjacent building, when the concrete entered into the plaintiff's insured's building. Presently, we are in the process of completing the depositions of the parties facts witnesses. One of the plaintiff's witnesses was deposed today, and my client, Isaac Rabinowitz is scheduled to be deposed tomorrow.

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Honorable James Orenstein
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August 8, 2012
Page 2

Last evening, at 5:50 p.m. I received an e-mail correspondence from counsel for defendant, Orange County Concrete that "two representatives from Orange County will be attending the deposition of HSD on Thursday." Counsel did not identify who these witnesses were, and has not previously identified a corporate witness to attend any deposition. I objected to the same, and requested that we address the issue today at the plaintiff's deposition.

Today counsel informed me that one of the representatives was a corporate vice president and the other was a consultant. I then inquired into whether either had an ownership interest in company. In response to this inquiry, counsel confirmed that one representative, Joel Falkowitz, is a vice president and has an ownership interest in Orange County Concrete, but the second individual, Martin Falkowitz is presently not an employee of the company and would attend as a consultant. Given the foregoing, we agreed that Joel Falkowitz is entitled to attend the deposition, but we objected to Martin Falkowitz's appearance.

The right to attend the deposition of a party is not unfettered, and a party is entitled to object to the attendance by a non-party. In this instance, HSD will be producing Isaac Rabinowitz for the deposition. Mr. Rabinowitz is a lay witness. He is not an engineer, nor has he been designated as an expert. His testimony will not be of such a nature that technical assistance is necessary, and even if it is, a principal with expertise will be present to assist counsel. Moreover, there is a possibility that the parties may need to conduct the deposition of Martin Falkowitz as a non-party. Thus, there exists the possibility the non-party's testimony may be tailored based on his attendance at the deposition.

HSD, Gold Development and Dushinsky are entitled to a protective order, precluding Martin Falkowitz from attending the deposition in accordance with FRE 615 and Fed. R. Civ. 30(c). *See, Calhoun v. Mastec, Inc.*, 2004 US Dist. LEXIS 13744 (WDNY 2004).

In order to keep the deposition schedule on track, we hereby request a conference call with the court to address this issue and our request that a protective order be issued precluding a non-party, Martin Falkowitz from attending my clients depositions.

Thank you for your courtesy and consideration of this request.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Gail L. Ritzert", written over a horizontal line.

Gail L. Ritzert (GR6120)



Honorable James Orenstein
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August 8, 2012
Page 3

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